

COMMISSION DECISION

of 8.2.2013

**pursuant to Article 7 (5) of Directive 2002/21/EC
(Withdrawal of notified draft measures)
Case PL/2012/1394: Wholesale Broadband Access in 11 communes in Poland**

Only the Polish version is authentic.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services as amended by Directive 2009/140/EC of 25 November 2009 and Regulation (EC) No 544/2009 of 18 June 2009 (the Framework Directive) and in particular Article 7(5) thereof¹,

Having regard to the opening of the second phase of investigation pursuant to Article 7(4) of the Framework Directive on 10 December 2012,

Having regard to the additional information provided by the Polish national regulatory authority, Urząd Komunikacji Elektronicznej (UKE),

Having regard to the notice posted on the Commission's website on 12 December 2012 inviting third parties to submit observations on the Commission's serious doubts letter (the Notice),

Having regard to the observations of the third parties received between 12 and 20 December,

Having regard to the opinion issued by the Body of European Regulators for Electronic Communications (BEREC) on 14 January 2013.

Whereas:

I. PROCEDURE

- (1) On 9 November 2012, the Commission registered a notification² from the Polish national regulatory authority, UKE, concerning the Wholesale Broadband Access (WBA) market³ in 11 communes in Poland under case number PL/2012/1394.

¹ OJ L 108, 24.4.2002, p. 33.

² In accordance with Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

- (2) On 19 November 2012, a request for information⁴ (RFI) was sent to UKE and a response was received on 23 November 2012.
- (3) On 10 December 2012, the Commission, pursuant to Article 7(4) of the Framework Directive, informed UKE that it has serious doubts as to the compatibility of the draft measures with EU law (the serious doubts letter) and that it considers that the proposed measure would create a barrier to the internal market.⁵
- (4) On 12 December 2012, the Commission posted a notice on its website inviting third parties to submit observations on the Commission's serious doubts letter. By the deadline foreseen for such observations (20 December 2012), 3 interested parties submitted observations to the Commission. The observations were carefully considered.
- (5) On 17 December 2012, the Commission sent an additional request for information to UKE. UKE's response was received on 20 December 2012.
- (6) On 19 December the Commission and UKE held a phone conference to discuss the details of legal and procedural implications of UKE's decision.
- (7) On 21 December 2012 the Commission and representatives of BEREC held a phone conference to discuss the issues raised in the serious doubts letter.
- (8) On 14 January 2013, the Commission received the opinion of BEREC.

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Market definition

- (9) As in the second review of the market (PL/2011/1184) UKE considers that at the retail level the market for broadband access comprises the provision of broadband Internet access over copper, FTTx, coaxial cable, LAN Ethernet and leased lines.
- (10) UKE proposes to include xDSL and FTTx based-access in the relevant market for wholesale broadband access. UKE excludes from the relevant market access through cable TV⁶, LAN Ethernet⁷, wireless and mobile networks (i.e. WiMax, GSM/UMTS/CDMA/LTE, WLAN, wireless radio access).

³ Corresponding to Market 5 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

⁴ In accordance with Article 5(2) of the Framework Directive.

⁵ C(2012) 9531.

⁶ As before UKE excludes cable TV networks from the product market at the wholesale level. UKE concludes that there are significant barriers to switching from WBA to cable TV networks rendering such a switch uneconomical. UKE considers that although there is a theoretical possibility of access to cable networks at the wholesale level there are significant technical limitations and high costs for implementing such a solution. UKE states that there is lack of potential interest from alternative operators for such a wholesale offer, given that they have already invested into Telekomunikacja Polska (TP's) WBA offer.

⁷ UKE explains in particular that the adaptation of the existing transport layers of the Ethernet network to enable shared access would require a large investment, would be uneconomic given the significant costs incurred to reach the connection point, and cover a relatively small number of customers.

- (11) With regard to the geographical scope of the relevant wholesale market UKE reaches the conclusion that it is appropriate to define a narrow market consisting of the territory of 11 communes ("the 11 communes"), where according to UKE, the market conditions are significantly different from the remaining territory of Poland. Although UKE has defined the relevant (product) market as a wholesale market for WBA, the geographic dimension of such market has been determined almost exclusively on the basis of the assessment of the competitive situation on the retail broadband market. In order to justify its geographic market definition UKE has assessed the following structural and behavioural elements:
- 1) in a given municipal area, none of the operators has a share of 40 % or more in terms of the number of clients on the retail broadband access market;
 - 2) in a given municipal area there are at least three operators which provide retail broadband Internet access;
 - 3) at least 50 % of premises in a given municipal area have access to the infrastructure of at least three operators;
 - 4) no more than 10 % of premises in a given municipal area have no access to the Internet;
 - 5) the standard deviation of the share of the three largest operators is not larger than 10 percentage points.
- (12) The main element put forward by UKE pointing towards a definition of a separate geographic (wholesale) market is the fact that UKE has not identified any operator which possesses individually or jointly significant market power (SMP) at the retail level (there is no operator having more than 40% of the retail broadband market), on the territory of those 11 communes. Moreover, the roll out of CaTV infrastructure in parallel to TP's infrastructure indicates substantial elasticity of supply and demand and possibility for the retail customers to freely choose or change their provider of broadband internet. Other elements pointing towards a definition of a separate wholesale market for the 11 communes include: a) customer preferences at the retail level⁸; b) characteristics of supply of retail broadband; c) lower retail prices; d) significantly lower entry and expansion barriers; e) customer switching at the retail level.
- (13) In addition, UKE presents an assessment of the above criteria (at the retail level) in the communes surrounding the 11 communes. UKE observes different competitive conditions like lower access speeds, higher prices, higher market share of TP, as well as a higher market share of the LLU and WBA operators (which can be directly linked to the absence of CaTV networks in such surrounding areas).
- (14) In its argumentation regarding the definition of the geographic market UKE does not reflect on the situation of the supply and demand-side on the wholesale market.

II.2. Finding of significant market power

- (15) UKE considers that TP does no longer have SMP in the relevant wholesale market, despite the fact that it is the only supplier holding a 100% market share⁹.

⁸ Preference for higher speed offers from CaTV providers.

⁹ TP is the only entity providing WBA in Poland. Other infrastructure operators (e.g. LLU operators) at the moment do not grant WBA access to third parties but use their infrastructure to serve final customers through their retail arm.

- (16) UKE considers that the market shares are not a reliable criterion to assess TP's market power, since TP would still maintain 100% even if it would provide only a small number of access lines of WBA (by volume). In addition UKE observes that on the territory of the 11 communes the retail broadband access, which is provided by means of WBA, constitutes only 4% of the market; this percentage is significantly higher in the areas surrounding the 11 communes and the remaining territory of Poland (13%).
- (17) UKE's assessment is also based on the following additional criteria: (i) low barriers to entry and expansion; (ii) economies of scale and scope; (iii) vertical integration; (iv) existence of countervailing buyer power; and (v) existence of potential competition.
- (18) With regard to potential competition on the wholesale market UKE concludes that 2 competitors (Netia and Telefonía Dialog) have sufficient resources to effectively compete with TP, in case they decide to enter the wholesale market for WBA. However, according to UKE only 3% of broadband customers are supplied by the LLU operators. Moreover, in its reply to the RFI UKE stated that in the territorial area of the 11 communes only 0.6% of the population is supplied by the LLU operators. In its reply to the RFI UKE has not presented any data concerning the number of TP's local exchanges in the area of the 11 communes, the number of local exchanges where LLU operators can unbundle the local loop, nor the potential reach of the LLU operators in terms of population or households.

III. THE COMMISSION'S SERIOUS DOUBTS

- (19) On 10 December 2012, the Commission, pursuant to Article 7(4) of the Framework Directive, informed UKE that it has serious doubts as to the compatibility of the draft measure and particularly the proposed market definition and the SMP assessment with EU law and that it considered that the proposed measure would create a barrier to the internal market.
- (20) In its decision the Commission found that the evidence brought forward by UKE does not point towards the finding of regionally differentiated retail or wholesale markets and therefore that the definition of a separate market for 11 communes is not substantiated. Moreover, an analysis which has been conducted by UKE (and notified to the Commission)¹⁰ on the basis of more recent market data led UKE to define a single, national WBA market, on which TP held SMP, contrary to the findings in the present notification.

IV. OBSERVATIONS SUBMITTED BY THIRD PARTIES

- (21) Three interested parties submitted observations to the Commission. The observations were carefully considered.
- (22) Two parties consider that the use of different market data sets obviously leads to different conclusions by UKE. Moreover those parties consider that, as the market is dynamically evolving, the use of newer data would have led UKE to further expanding the area considered as competitive. Both parties consider that regional differentiation of pricing (at the retail level) is a common practice on the Polish market, and that this is evidenced by special offers in direct marketing. Moreover, those two parties underline that the notified measure does not provide any withdrawal of obligations currently imposed on TP, and that any forthcoming UKE decision in that regard would

¹⁰ PL/2012/1311.

have to take into account the situation of WBA access seekers and would have to be consulted at national and EU levels. Finally, those two parties consider that in any event the behavior of TP on those competitive areas can be controlled through the ex-post application of competition rules, which will be more efficient than ex-ante regulation.

- (23) Another interested party expressed its support of the Commission's serious doubts regarding the market definition and the SMP assessment. This party expressed concerns about the proposed deregulation of the 11 communes. The party stated that in the absence of regulation, there will be no appropriate wholesale offers on the market and that it will not be economically feasible (even if technically possible) to "climb the investment ladder" to the next rung (i.e. LLU). This party underlined that in some of the 11 communes there is not a single operator who is present at the local exchange and in some other communes a significant number of retail customers could not be reached by means of LLU. Furthermore, given the past experience it would also be unrealistic to expect from TP to provide access to WBA on commercial (unregulated) terms.

V. BEREC OPINION

- (24) On 14 January 2013, the Commission received BEREC's Opinion on the Commission's serious doubts letter. In its opinion, BEREC states that it considers that the Commission's serious doubts regarding the draft decision of UKE are justified.
- (25) BEREC is of the opinion that reliance on old data, as UKE proposes, is not in itself a problem if there is evidence that there have been no significant changes since the data was collected. However, in this case the more recent data shows a very different picture of the relevant market when compared to the current notification, which is based on older data. This suggests that the data used for the purpose of the current market analysis is not reliable and/or does not produce an adequate reflection of the current state of the market.
- (26) Moreover, according to BEREC, the criteria applied to assess competition only require 50% of retail customers in an area to have access to three or more broadband providers based on infrastructure competition (in Poland, LLU take up is low, so these alternatives to TP are mainly cable operators). However, this leaves in some areas in the 11 communes up to 50% of retail customers with just two or even one provider. Indeed, UKE's analysis suggests that one third of customers in supposedly competitive areas have the choice of just one or two or no operator at all. This does not, in BEREC's view, seem to be consistent with effective retail competition, which appears to be UKE's primary justification for the lack of SMP at the wholesale level.
- (27) BEREC considers that while there is some evidence of infrastructure based competition on the retail market, UKE could have strengthened its argumentation by introducing the interrelation of retail and wholesale markets with special regard of the self-supply of the vertically integrated alternative operators.
- (28) BEREC recommends UKE to withdraw its notification and conduct a market analysis following the best practices of the Member States and the Commission's guidelines on market analysis and the assessment of significant market power.
- (29) Pursuant the Article 7(5) of the Framework Directive, the Commission shall take utmost account of the opinion of BEREC.

V. ASSESSMENT

- (30) Under Article 7(4)(b) of the Framework Directive, where the intended measure aims at deciding whether or not to designate any undertaking as having, either individually or jointly with others, significant market power in accordance with Article 16(3), 16(4) or 16(5) of the Framework Directive and would affect trade between Member States, and the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the internal market or it has serious doubts as to its compatibility with EU law and in particular objectives referred to in Article 8, the draft measure shall not be adopted for a further two months. Under Article 7(5) of the Framework Directive, within this two-months period, the Commission may take a decision requiring the national regulatory authority concerned to withdraw the draft measure and/or to take a decision to lift its reservations expressed in the serious doubts letter.
- (31) The Commission considers that the draft measure falls within Article 7(4)(b) of the Framework Directive because UKE proposed not to designate any undertaking as having significant market power within the 11 communes concerned.
- (32) The Commission considers that the draft measure would affect trade between Member States because the conditions for the access to the relevant market determine the cost and the ability of other operators (including those established in other Member States) to provide electronic communications services. The draft market definition, the finding of absence of SMP and removal (at the later stage) of any existing remedies imposed on TP in those 11 communes in Poland may therefore have an influence, direct or indirect, actual or potential, on the ability of any undertaking established in Poland or in other Member States to offer electronic communications services on the Polish market. The lack of regulation of this market in substantial parts of Poland (in terms of potential customers) would affect the ability of access seekers (including those established in other Member States) to offer broadband services in Poland.
- (33) Further, as reasoned below, the Commission considers that UKE's definition of the relevant market (in particular its geographic segmentation), on the basis of which it has exempted 11 communes in Poland from ex ante regulation, is not compatible with EU law, and particularly with the obligation that NRAs shall, taking utmost account of the Recommendation 2007/879/EC and the SMP Guidelines¹¹, define and analyze relevant markets in accordance with the principles of competition law.
- (34) The Commission considers that the geographic segmentation of the relevant market as proposed by UKE is not supported by evidence. Further, the Commission notes that pursuant to Article 8(2)(a) to (c) of the Framework Directive, NRAs shall contribute to the development of the internal market by ensuring that there is no distortion or restriction of competition in the electronic communications sector and by encouraging efficient investment in infrastructure and promoting innovation. The Commission considers that in the case at hand, UKE's definition of a separate relevant market consisting of 11 communes in Poland is not conclusively supported by any quantifiable evidence of different market conditions in those 11 communes compared to the rest of Poland, and therefore that it does not fulfil the goals of the Framework Directive and particularly those enshrined in Article 8.

¹¹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services (2002/C 165/03), ("the SMP Guidelines").

- (35) Further, the Commission considers that not only UKE's conclusions on the market definition, but also its conclusions as to the lack of SMP do not follow the principles of competition law. The SMP assessment has been based on outdated market data, which do not reflect the current market situation. As BEREC rightly pointed out in its opinion, the data, provided by UKE, are not reliable and/or do not produce an adequate reflection of the current state of the market.
- (36) In addition, the Commission considers that the proposed measure would create a barrier to the internal market, inter alia, as the conditions for wholesale access determine the costs and the ability of other operators (including those established in other Member States) to enter the corresponding retail markets to a significant extent.
- (37) The Commission notes that Article 16 of the Framework Directive lays down that the national regulatory authorities shall carry out an analysis of the relevant markets taking into account the markets identified in the Recommendation and taking utmost account of the Guidelines. As a result, UKE's analysis of whether any operators have SMP on the WBA market(s) in Poland must be based on the properly defined relevant market(s).
- (38) The Commission considers that the proposed measure defining the separate relevant market for the territory of 11 communes in Poland and finding of effective competition on the relevant wholesale market is not compatible with EU law for the following principal reasons:

Reliance on outdated data, contradicting UKE's more recent market assessment

- (39) The Commission, like BEREC, considers that UKE's conclusions concerning the definition of the relevant market and the SMP assessment are based on outdated market data. In its assessment UKE does not take into account significant structural changes on the market. Specifically, changes which are not reflected in the draft decision include the merger between main competitors operating on the fixed telephony and broadband markets (Netia and Dialog, completed during 2011), and the merger between important cable TV operators (UPC and Aster, completed in 2011). Moreover, UKE's most recent market analysis¹², based on newer data, led UKE to reach significantly different conclusions, namely the finding of SMP in one national market, consisting of the whole territory of Poland. The Commission, like BEREC, considers that UKE has not based its assessment on objective and transparent market data, which reflect the current state of the relevant market.
- (40) For the above reasons the Commission considers that the notified measure is not compatible with the EU law and in particular Article 3(3) and the objectives referred to in Article 8 of the Framework Directive.

Lack of sufficient evidence supporting the delineation of a separate geographic market consisting of 11 individual communes in Poland

- (41) On the basis of the information provided in the notified measure and additional information received from UKE and interested third parties, the Commission considers that the delineation of a separate geographic market consisting of 11 communes in Poland is not in conformity with competition law principles. The analysis of the geographic market must define an area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from

¹² Notified to and assessed by the Commission under case number PL/2012/1311.

neighbouring areas because the conditions of competition are appreciably different in those areas. It is necessary, in that assessment, to take particular account of the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, the existence of appreciable differences in the undertakings' market shares, or price differences¹³.

- (42) The Commission, fully supported by BEREC, considers that UKE has based its assessment of the geographical scope of the WBA market on the characteristics of the retail broadband market, and that UKE has failed to clearly describe the relationship between the retail and the wholesale markets and how on that basis it is justified to define relevant geographic market consisting of the 11 communes which is different from the WBA market in the rest of the territory of Poland..
- (43) The Commission notes that, in accordance with principles of competition law¹⁴, in the electronic communications sector the geographic scope of the relevant market has traditionally been determined by reference to two criteria: the area covered by the network and the scope of application of legal and other regulatory instruments. This corresponds generally to the territory of a Member State, although it cannot in principle be excluded that NRAs have sufficient grounds for finding sub-national geographic markets.
- (44) The Commission's notice on the definition of the relevant market for the purposes of Community competition law¹⁵ further outlines the Commission's approach to geographic market definition where it states that the Commission "*will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purpose of arriving at a precise geographic market definition*"¹⁶.
- (45) As regards the definition of sub-national markets, the Commission considers that a geographic delineation which is primarily based on the number of alternative infrastructures present in an administrative unit (commune) is not sufficiently detailed or robust to identify real differences in competitive conditions for the purposes of market definition. In assessing whether conditions of competition within a geographic area are similar or sufficiently homogeneous, additional structural and behavioural evidence, including pricing in those areas, is necessary¹⁷.

¹³ Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), para 8; joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, '*Kali & Salz*', paragraph 143; joined Cases T-346/02 and T-347/02 *Cableuropa and Others v Commission* [2003] ECR II-4251, paragraph 115.

¹⁴ See also the Commission's Explanatory Note accompanying the Recommendation on Relevant Markets, SEC(2007) 1483 final.

¹⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), paras 28-31.

¹⁶ The notice outlines further that it will also need to be established whether companies in different areas do indeed constitute an alternative source of supply for customers and whether companies located in different areas would face impediments to developing their sales on competitive terms throughout the whole geographic market.

¹⁷ See case UK/2007/0733.

- (46) In this case, the Commission considers that UKE has not demonstrated that the WBA market can be divided into smaller, sub-national geographic markets. This Commission's consideration is furthermore supported by UKE's conclusions reached in March 2012, on the basis of the most recent market data, which it does not use for the current market review, that the geographical scope of the market is nation wide.
- (47) First of all, a single national market may follow from the fact that TP applies a single, national wholesale price. Furthermore, as explained by UKE in its reply to the first RFI, TP could apply differentiated prices, if it was able to objectively prove differentiated conditions and circumstances, which could justify such differentiation. However, TP has never chosen to offer wholesale services in any of the 11 communes at discounted prices which indicates that the competitive constraints on TP are the same in these communes and the rest of Poland.
- (48) Furthermore the Commission, like BEREC, notes that UKE has not presented any consistent and quantifiable evidence on regional pricing at the retail level. UKE stated that it considers regional pricing to be established and proved by the fact of locally targeted advertising campaigns, covering limited geographical areas. Further, UKE states that an analysis of such regional pricing would be overly complex and burdensome, as it would require the collection of local marketing information at a very detailed level. The Commission does not share UKE's assertion in this respect.
- (49) Firstly, the Commission considers that UKE has legal means to request appropriate information on the regional pricing schemes from the operators at a central level, and operators usually comply promptly with any such data request from UKE.¹⁸
- (50) Secondly, the Commission does not share UKE's conclusions as to the existence of regionally differentiated retail prices. To the contrary, it appears that the unregulated retail prices of TP, as well as alternative xDSL operators and cable providers are uniform within the entire extent of their operations, regardless of whether such areas fall within or outside the 11 communes. The only example of special price conditions, outside the regular, publicly available and advertised price lists, seem to relate to a "retention offer", targeted specifically to customers who are close to the expiry of their contract, or even signalled their willingness to switch operators. There is however no evidence that such offers are targeted to consumers who reside in certain areas.
- (51) UKE relied heavily in its argumentation on infrastructure based competition (based mainly on self supplying cable networks), but did not examine whether the conditions for an indirect price constraint were fulfilled. As BEREC stated, if UKE wanted to base its assessment on indirect price constraints, then UKE should have applied it more explicitly and with reliable evidence in either the market definition or in the SMP designation procedure.
- (52) Furthermore, the Commission considers that a variation of retail prices, if they were to exist, would not be sufficient to identify separate geographic markets at the wholesale level. Indeed, as BEREC indicated in its opinion, the relation between the retail and wholesale market has to be clearly described. In this respect, the Commission concurs with BEREC's findings that the criteria used by UKE to differentiate geographic regions at the retail level, should they exist in reality, do not appear to adequately reflect differences in competitive conditions on the WBA market.

¹⁸ This is evidenced by extensive annual data collection requests by UKE, covering the details of infrastructure reach and customer base up to the level of individual addresses (dwellings).

- (53) In particular, under UKE's third criterion used to assess competition, only 50% of consumers within an area are ensured the choice of three independent infrastructure operators, and so up to 50% of consumers in some areas in the 11 communes have the choice of two or perhaps even just one operator. Moreover, UKE provides very little evidence of the distribution of cable and LLU networks within the communes. The Commission therefore notes that the competitive conditions even within the 11 communes seem not to be sufficiently homogenous respectively and the use of administrative borders to delineate geographic markets seems not to be an appropriate criteria for establishing sub national markets in Poland.
- (54) In conclusion, the Commission considers that UKE's proposed geographic market definition is not compatible with EU law, more precisely with the requirements laid down in Article 15(3) of the Framework Directive, in light of the objectives set out in Article 8 of the same directive. Whilst the Commission notes that there are some differences at the retail level of the broadband market in Poland, the Commission does not consider that these differences are in itself sufficient to identify separate wholesale geographic market in the territory of the 11 communes. The Commission, like BEREC, considers that UKE has failed to demonstrate that the 11 communes constitute separate regional market for WBA.

Lack of evidence supporting the finding of effective competition in the defined market

- (55) As noted by the Commission in its decision on the opening of a Phase II investigation in the current case, UKE has reached its conclusion as to the state of competition in the WBA market mainly by reference to infrastructure competition at the retail level (competitive constraint stemming from CaTV networks). Moreover, UKE has concluded that such alternative infrastructures (CaTV networks) are not within the product market definition of the WBA market. Therefore the Commission, like BEREC, considers that UKE failed to demonstrate how and to what extent the infrastructure competition on the related retail market would directly or indirectly constrain TP on the WBA market.
- (56) Furthermore, even in the second phase of the investigation, UKE could not provide any data on the number of TP's local exchanges where alternative operators could unbundle the local loop, and therefore immediately and credibly constrain TP with regard to WBA. Given the very low take up of LLU in Poland, the Commission, like BEREC, does not agree with UKE's conclusion that potential competition from the LLU market could constrain TP on the WBA market.
- (57) Additionally, the Commission considers that TP's nation-wide network, primarily based on copper infrastructure, is still unique in its territorial reach. There is no other competing network which could provide WBA services to the access seekers. In this way TP's position is unmatched by competition stemming from cable networks, as such cable networks do not provide WBA services, or could not realistically be expected to provide such access. Finally, in particular when considering the needs of business customers (when compared to residential users) who require multi-site connections, the offer of TP's WBA seems to be the only one that meets the requirements of those customers that prefer to contract with one single nation-wide provider.
- (58) The Commission has thoroughly assessed the additional information concerning the historical development of pricing and market shares (from 2010 – 2012), as presented by UKE in its second reply to the Request for Information. Firstly, the Commission notes that the information provided is incomplete, as it does not include the

information on the level of pricing at the retail broadband market of the main competitors, namely Aster, UPC and Netia.¹⁹ Furthermore, the information presented is misleading as UKE calculates the market shares for two companies belonging to Orange group individually (TP and PTK Centertel, the second being a 100% owned subsidiary). On the basis of such calculations UKE concludes, in its reply to the Request for Information, that the market share of TP systematically decreased over the last 3 years, while the market shares of competing operators increased. The Commission notes that the market share of TP has indeed decreased, while this decrease is more than compensated by the growth of the customer base of its fully owned subsidiary (PTK Centertel). Overall, in the last 3 years Orange group has increased its market share on the retail broadband market to above 41%. On the other hand, the market shares of competitors are fragmented (5-10%) and either stagnant or decreasing. Finally, the Commission notes that UKE's conclusion as to the lack of SMP is contrary to UKE's findings on the basis of the most recent market data. Therefore, the Commission considers that UKE has not provided sufficient evidence to substantiate the finding of effective competition on the WBA market in the 11 communes in Poland.

Creation of barrier to the internal market

- (59) The Commission believes that a potential withdrawal of existing regulatory obligations on the basis of outdated market information and in contradiction to UKE's recent market review based on new data, creates serious doubts as to the reliability of such an assessment and therefore creates distortions in the internal market. Further to that, without regulated access to TP's infrastructure (based on legacy copper or future FTTH lines), TP will be able to limit the expansion of alternative providers of broadband access at the retail level. This would impact on the ability of alternative operators to offer to their retail (business) customers pan-European connectivity and other cross-border services. On the basis of the above, the Commission considers that the draft measure would create a barrier to the internal market under Article 16 of the Framework Directive.

VI. CONCLUSION AND PROPOSALS FOR AMENDING THE DRAFT MEASURES

- (60) Following the detailed examination of UKE's notified draft measure, its submissions, third parties' submissions and having taken utmost account of BEREC's opinion, and for the reasons stated above, the Commission concludes that the evidence available does not support the geographic market definition and the finding of effective competition on the defined relevant market as proposed by UKE.
- (61) Therefore, the Commission considers that the draft measure with regard to market definition and SMP assessment is not compatible with EU law, in particular with Article 8 of the Framework Directive.
- (62) The Commission has not found any conclusive evidence supporting the geographical segmentation of the WBA market in Poland. The evidence brought forward by UKE does not point towards the finding of regionally differentiated retail or wholesale markets. Moreover, an analysis which has been conducted by UKE on the basis of the most recent market data led UKE to define a single, national WBA market. In the second phase of the assessment of the current notification UKE has not presented any

¹⁹ Netia is included in the statistics for 2012, but not Aster and UPC.

conclusive evidence on regional pricing schemes, neither by TP nor by other, unregulated, operators.

- (63) The Commission further notes that UKE's SMP assessment is not based on recent, objective, and reliable market data.
- (64) The Commission notes that the regulatory framework does not exclude the imposition of different remedies in the same relevant market, in cases where differences in competitive conditions are observed but the evidence may not be such as to justify the definition of sub-national markets.²⁰ Based on the general principle that remedies should be tailored and proportionate to the identified competition problem, it can be appropriate for NRAs to impose remedies which take account of locally/regionally differentiated competitive conditions while retaining a national geographic market definition. The geographic differentiation of remedies may be appropriate in those situations where, for example, the boundary between areas where there are different competitive pressures is variable and likely to change over time, or where significant differences in competitive conditions are observed but the facts would not point to sub-national markets. In addition, a differentiation of remedies may be appropriate where premature removal of *ex ante* regulation could have significant detrimental consequences for consumers and the competitive process. It is also important that any proposed market boundaries would be sufficiently stable over time²¹.

HAS ADOPTED THIS DECISION:

Article 1

Urząd Komunikacji Elektronicznej shall withdraw the entire draft measure notified to the Commission on 9 November 2012 and registered under case number PL/2012/1394.

Article 2

The Commission invites UKE to amend UKE's most recent draft market assessment (as notified under case PL/2012/1311), in particular to revise the proposed remedies in line with the Commission's Recommendation of 27 August 2012, and, following the appropriate consultation process, adopt its final measure as soon as possible.

In the alternative, UKE should undertake a new market analysis of the WBA market in Poland, having regard to the Commission's present decision and BEREC's opinion. UKE should in particular:

- strengthen its assessment of the interrelation between the retail broadband market and the WBA market;
- provide a thorough, forward looking, assessment of the supply-side and demand-side substitutability on the WBA market;
- provide an assessment of such retail products which are the most relevant for retail consumers (broadband, telephone and TV bundles);
- provide detailed, reliable, and up-to date information on market developments (in terms of complete information on market shares, prices at retail and wholesale level, geographic

²⁰ For example cases AT/2008/0757, FR/2008/0914, PL/2011/1184 and recently PL/2012/1311.

²¹ See case UK/2007/0733.

presence of alternative networks ideally on the basis of individual exchanges), over time as well as on a forward looking basis.

Article 3

This Decision²² is addressed to:

Prezes Urzedu Komunikacji Elektronicznej
18-20 Kasprzaka Street
01-211 Warsaw
Poland

Done at Brussels,

For the Commission
Neelie Kroes
Vice-President

²² Pursuant to point 14 of the Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. UKE is invited to inform the Commission within three working days following receipt whether it considers, in accordance with European Union and national rules on business confidentiality, that this document contains confidential information which it wishes to have deleted prior to such publication. UKE should give reasons for any such request. The request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.